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JOHN MARSHALL HARLAN.

Mr. Justice Harlan died at his residence in Washington on Saturday, October 14th, 1911, after a brief illness. Acute bronchitis was the cause of his death. He was present at the opening of the court on Monday, the 9th of October, and sat that day, but never appeared in the courtroom again. He was born in 1833 in Boyle County, Kentucky, and named after the great Chief Justice of the Supreme Court. He was educated at Centre College, Kentucky, and studied law at Transylvania University. He began to practice at Frankfort, Kentucky, and in 1858 first sat on the bench as County Judge. In 1859 he was Whig candidate for Congress from the Ashland District of Kentucky, and a little later, removing to Louisville, went into partnership with W. F. Bullock.

He left his law practice and set to work to recruit the Tenth Kentucky Infantry, U. S. A., when the Civil War started. He received his commission as colonel and fought all through the campaigns which saved Kentucky for the North. Not till his father died in 1863 and he was badly needed at home did he retire, and thus missed the promotion to a Brigadier Generalship, which was already before the United States Senate.

On his return from the war Colonel Harlan was elected Attorney General of his State, and in 1871 he ran for Governor on the Republican ticket without success against his old friend, J. B. McCreary, afterwards Senator. In 1872 he was well enough known to be mentioned as a possible candidate for the Vice Presidency on the Grant ticket, and three years later he again stood for Governor in Kentucky. He headed the Kentucky delegation to the Republican National Convention in 1876 and played a leading part in obtaining the nomination for Hayes instead of Blaine. At the critical moment he switched the vote of his state from Bristow to Hayes, and this resulted

in the withdrawal of Bristow and the gathering of sufficient support for Hayes to place him at the head of the ticket.

President Hayes wished to recognize Harlan's action by making him Attorney General in his Cabinet, but, advised not to do so for political reasons, he offered him instead a diplomatic post. Harlan refused, but accepted an appointment to the Louisiana Commission. This brought him to Washington, and it was during the session of the Commission that he accepted a seat on the Supreme Court Bench. He was appointed on Nov. 29th, 1877, and actually began his service Dec. 10th.

His nomination was regarded at the time as a political one, but it was not long before the new Justice showed that he formed his own views and was prepared to assert them, however great the odds against him. A few months after he had been sworn in he gave an emphatic dissent to a decision in which a majority of his colleagues practically gave sanction to an act passed by Tennessee while in a state of what was then called rebellion. In 1882 he again differed from the views of the Court, with the support in only case of one other Justice, in three suits involving State rights, which were decided on one day. Since then his voice has been heard in protest in many of the most important matters before the Supreme Court.

Justice Harlan always claimed to be a stalwart upholder of the strict provisions of the Constitution, and yet he was in favor of the extension of the Federal power in the interest of strong government, within the limits of the Constitution as he construed it. Speaking at the dinner given him in Kentucky in honor of his completion of thirty years in the Supreme Court, he appealed for the "broad and liberal, yet safe rules of Constitutional construction approved by the fathers and established by judicial decisions." For thus only, he said, can the dual system be maintained under which the Federal power is forbidden to exercise powers not granted to it, expressly or by necessary implication, and the states are not hindered in the exercise of powers not surrendered to the Union.

So in the Young case, 209 U. S. 123, 52 L. Ed. 714, when the Court held that a Federal court may enjoin the officers of a state from enforcing the law of a state, Justice Harlan dis-

sented. In the three leading prohibition decisions—the Leisy, 135 U. S. 100, Rhodes, 170 U. S. 412, and Mugler, 123 U. S. 623, cases—Justice Harlan took strong ground in defense of state rights.

He stood up strongly for the guarantees of the Constitution. In 1883 the Supreme Court had to pass on the Hurtado case, 110 U. S. 516, in which for the second time (the Slaughter House case, 11 Wall. 35, being the first) the interpretation of the Fourteenth Amendment, forbidding the deprivation of any citizen of "life, liberty or property without due process of law," was determined. California had abolished, even in capital cases, indictment by the grand jury in favor of a mere affidavit by the District Attorney. The Court upheld the California law, and Justice Harlan alone declared that the Grand Jury system is so fundamental a portion of the American system of justice that it could not be dropped. Since then the Court in other decisions has modified itself to agree with the sturdy Kentuckian.

In the Robertson *v.* Baldwin, 165 U. S. 275, the question at issue was the constitutionality of the law forbidding seamen to desert their ships in the light of the declaration of the Thirteenth Amendment, that involuntary servitude cannot exist in the United States. Justice Brown cited history as far back as the Hanseatic League and the ancient inhabitants of Rhodes to show that the Thirteenth Amendment could not be applied to seamen. Again standing alone, Justice Harlan in a masterly opinion demolished his colleague's historical precedents, and maintained that sailors, as well as any other citizens, were protected by the Constitution.

So it was natural that when the problems connected with imperialism presented themselves Justice Harlan was found on the side of the extension of the jurisdiction of the Constitution. In the Hawaii *v.* Mankichi, 190 U. S. 197, as in other so-called "insular cases," Dunn *v.* U. S., 195 U. S. 138, and Rassumssen *v.* U. S., 197 U. S. 516, the Court held that the Constitution did not apply to the transoceanic possessions. Justice Harlan, with relentless logic, rejected the view.

"Should the principles now established," he declared, "become firmly established, the time may not be far distant when,

under the exactions of trade and commerce, and to gratify an ambition to become the greatest political power in all the earth, the United States will acquire territories in every direction which are inhabited by human beings, over which territories, to be called 'dominions,' we will exercise absolute dominion, and whose inhabitants will be regarded as 'subjects,' to be controlled by Congress as it may see fit, not as the Constitution requires nor as the people governed may wish."

Another of his famous dissents was in the income tax case. Pollock *v.* Farmers Loan, etc., 158 U. S. 601. It was part of the Wilson Tariff Act, and its constitutionality came before the Supreme Court on May 20th, 1894. Five of the Justices, a bare majority of the Court, ruled against it on the ground that it was not apportioned among the states according to population. Justice Harlan led the minority, and declared that the opinion of the majority "strikes at the very foundations of national authority, in that it denies to the General Government a power which is, or may become vital to the very existence and preservation of the Union in a national emergency."

In the Northern Securities cases, 193 U. S. 197, 48 L. Ed. 679, 194 U. S. 48, 4 L. Ed. 870, on the other hand, Justice Harlan found himself in sympathy with his colleagues, and to him was intrusted the responsibility of framing the decision of the Court. After affirming the power of Congress to regulate interstate and international commerce, he laid down, in the first decision at p. 332:

"That to vitiate a combination such as the act of Congress condemns it need not be shown that such combination in fact results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition."

But after all it is by the independent position which Justice Harlan took in the last months of his life in the Standard Oil and the Tobacco cases that he is likely to be best remembered. He would have none of the doctrine that the Supreme Court had any right to read into the anti-trust statute the word "rea-

sonable," as applied to combinations in restraint of trade, and he stood for the rigid enforcement of the law as it was written, regardless of the consequences to individuals or even the community at large. The decision of his colleagues in the Standard Oil suit he characterized as a "blow at the integrity of our Governmental system, and in the end will prove most dangerous."

It was in his estimation an example of judicial legislation that, as he saw it, was essentially "mischievous." For he said: "In the now not very short life that I have passed in this capital and the public service of the country the most alarming tendency of this day in my judgment, so far as the safety and integrity of our institutions are concerned, is the tendency to judicial legislation."

To the Tobacco case Justice Harlan applied the same argument, based on the absolute necessity of upholding the division of powers contained in the Constitution, and thus in the last important acts of his public life Justice Harlan was true to the faith that led all his career.

In point of service Justice Harlan was exceeded by only two Justices—Chief Justice Marshall, who served thirty-four years, five months and five days, and Associate Justice Stephen J. Field, who served thirty-four years, six months and ten days. Harlan served thirty-three years, ten months and twenty-five days. He was a man of massive build, splendid physique, smooth shaven, very bald, and with a ruddy complexion which showed clean living and sturdy health. Devoted to golf, he played the game with skill and devotion, and carried to it the same zeal and earnestness which characterized his whole life. In his religious convictions he was a Presbyterian of the strictest school, though broad-minded and generous in his views. He was a regular church attendant, taught every week a Bible class, and was a firm believer in the rigid observance of Sunday. In addition to his duties on the Supreme Bench he regularly delivered a course of lectures on Constitutional Law at Columbian (now George Washington) University, and during the summer of 1896 delivered a series of lectures on Constitutional Law at the Summer Law School of the University of Virginia. He was an intense admirer of Madison and during

his visit to the University made a special visit to Montpelier. His great urbanity and pleasant, genial manners made him a host of friends in Charlottesville, amongst those of the legal profession, as well as others. He loved the good things of life —loved a joke, had a keen and ready wit, and was willing to give and take, though never losing the calm dignity which seemed a part of his character. A very staunch Democrat the day he left presented the Judge with a volume of the very scarce Madison's Debates—a copy of which he had much desired—and also a bottle of twenty-five year old apple brandy, remarking as he did so that he hoped the combination would make a good Democrat of him.

"Sir," the old Judge replied, with a twinkle of his eye, "If I thought that I would break the bottle—after I had emptied it."

On one occasion it is said whilst on circuit, a zealous young barrister was arguing a case when the Judge stopped him and said that he desired no further argument, being satisfied that the law and the facts were with the speaker. But the young man had no idea of losing his oration, and kept on for half an hour despite the repeated interruptions and decided impatience of the Judge. When he at last sat down Justice Harlan ceased a very vigorous and rather rapid "chawing" of tobacco and said benignly, "Very well, sir! *In spite* of your argument the Court is still of the opinion that the case is with you."

He was very fond of the late Justice Peckham. The latter twitted him about his Presbyterian predilections and in turn was twitted about being a Democrat. On one occasion Justice Harlan was explaining to his brethern on the bench that he would be forced to absent himself from Court on the following day to attend a Presbyterian Assembly.

"You are such a good Presbyterian, Harlan," said Justice Peckham, "that I don't see why you are afraid to die."

"I would not be afraid," responded Justice Harlan, "if I were sure that in the next world I would not turn up at Democratic headquarters."

Justice Harlan resented a story that he was in the habit of borrowing tobacco from Chief Justice White.

"I never borrowed a chew from White in my life," said Justice Harlan. "White always borrows from me."

Once a disorderly individual was creating a disturbance on the car on which the late Justice was a passenger.

"Why don't you put that man off? inquired Justice Harlan of the conductor, with some heat.

"It would be against the law," answered the conductor.

Judge Harlan chewed tobacco all his life. In the course of the hearing of the "Tobacco Trust" case before the Supreme Court last Spring Justice Harlan told one of the "Tobacco Trust" lawyers, who was addressing the Court that all the tobacco he bought these days was either spoiled or adulterated. The story was published and the Justice received samples of chewing tobacco for many weeks.

One of his favorite competitors at golf was Dr. J. McBride Sterritt, a retired clergyman. One day Dr. Sterritt prepared to tee off, but missed the ball entirely. He looked at the sphere for a moment in disgust without saying a word.

"Doctor, that is the most profane silence I ever heard," remarked Justice Harlan.

In private life Justice Harlan was a typical Southern gentleman. Unpretentious and simple in his taste, he built a home on what was the outskirts of Washington at the time of its erection. The city crept to it and beyond it, but there was a marked individuality about the house, which still maintains the dignified air of a county mansion.

It is hard at this time to make a fair estimate of his greatness as a judge. His opinions are strong, well written and leave very little doubt as to what he meant. He will probably go down in legal history as the "Great Dissenter"—not so much on account of the number of his dissenting opinions as on account of the importance of the cases in which he differed with the majority of the Court. When he dissented he never hesitated to criticise the opinion of the Court. There was often a touch of indignation in the language he used, and almost an inability to understand how his colleagues could have differed from him, could be seen in each sentence. He had absolute confidence in the correctness of his own opinion and with his great power of judgment and vigor of expression made a wonderfully strong presentation of his view of any case. He was exceedingly consistent and there can be found very little

change, in his views of the principles of interpretation and construction of the Constitution, in his opinions, running as they did through so many years. The old Whig inheritance from his birth, environment and early association, leavened the whole lump of his being and was apparent whenever a Constitutional question was involved. He called himself a strict constructionist of the Constitution, but as a witty Virginian once said of a great Whig politician, "It might have been a Whig air he played, but there were a great many variations." And so Justice Harlan's "strict construction" would have been thought very loose in the good old days "befo' de wah."

In questions concerning civil rights he was inflexible. He dissented in many cases in which the so-called "rights of the negro" were denied to be "rights." He once remarked anent his dissenting opinion in the "Jim Crow" car cases that it was about as outrageous to separate the races on trains as to require all red-headed men to ride in different cars from black-headed ones. "Could a State do that?"

"Why not, Judge?" asked one of his listeners, "if they were given equal accommodations? Have you forgotten the old time 'ladies' cars' on the trains? Was not this a separation on account of sex? And if the sexes could be separated, why not the races?" The Judge made no reply.

He was a fearless Judge—absolutely independent and determined to do the right as he saw it. No matter who his successor may be, he cannot be a purer man, a higher man, or a man more devoted to the cause of justice. And it will be hard to find a more massive and forceful intellect, or a man held in higher respect and admiration—respect and admiration because a character such as his commanded the one and deserved the other.

R. T. W. DUKE, JR.